

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE COMMISSIONER OF VETERANS AFFAIRS

Harold J. Ring,

ORDER ON CROSS-MOTIONS
FOR SUMMARY DISPOSITION

Petitioner,

V.

Metropolitan Waste Control
Commission (MWCC),

Respondent.

By written Motion dated June 14, 1994, the Petitioner, Harold J. Ring (Mr. Ring, Petitioner or Employee), seeks an Order of the Administrative Law

Judge Granting Summary Disposition in the above-captioned matter. Mr. Ring asserts that he is a veteran and is being removed from his position for physical inability to perform his job as a plant operator with the Respondent. The Employee contends that under Myers_v._City of Qakdall, 409 N.W.2d 848 (Minn. 1987), removal for physical inability to perform a job is equated with incompetency for purposes of Minn. Stat. 197.46 (1992). Mr. Ring further argues that Minn. Stat. 197.46 (1992) provides him with an absolute right to a veterans hearing on the issue of physical incompetency before the Office of Administrative Hearings and until that hearing is held the Respondent must continue to pay him all salary and benefits.

By written response dated June 28, 1994, the Respondent opposes the Petitioner's Motion for Summary Disposition and, itself, makes an alternative Motion for Dismissal or Summary Disposition. The Respondent argues that the Petitioner's Motion is subject to disputed issues of fact. With respect to its own Motion for Dismissal or Summary Disposition, the Respondent contends that the Reasonable Accommodation Panel established by MWCC has determined that no reasonable accommodation to Mr. Ring's disability is appropriate. Mr. Ring did not contest the determination by the MWCC's Reasonable Accommodation Policy Committee made in accordance with its Reasonable Accommodation Policy and procedure. Hence, the Respondent argues either by agreement or by inaction Mr. Ring has waived any hearing right he might otherwise have. Respondent also argues that Myers v. City of Oakdale, supra, may be distinguished from Mr. Ring's claim. Finally, the MWCC contends that even if

Mr. Ring were entitled to a hearing on the issue of reasonable accommodation,
it would be necessary to deduct from any continued wages and benefits ordered
all collateral source payments received by the Petitioner during his period of
disability.

By letter dated July 5, 1994, the Petitioner waived his right to respond
to the Respondent's Cross-Motion for Summary Disposition.

Appearances: Jesse Gant, III, Attorney at Law, Grain Exchange Building, Suite 915, 400 South Fourth Street, Minneapolis, Minnesota 55415, appeared on behalf of the Petitioner, Harold J. Ring; and Jeanne K. Matross, Associate General Counsel, Metropolitan Waste Control Commission, Mears Park Centre, 230 East Fifth Street, St. Paul, Minnesota 55101-1633, appeared on behalf of the Respondent, Metropolitan Waste Control Commission.

The record on the Cross-Motions closed on July 5, 1994, with the receipt by the Administrative Law Judge of the Petitioner's letter waiving a right to respond to the Cross-Motion of the Respondent.

This Report is a recommendation, not a final decision. The Commissioner of Veterans Affairs will make the final decision after a review of the record which may adopt, reject or modify the Findings of Fact, Conclusions, and Recommendations contained herein. Pursuant to Minn. Stat. 14.61 (1992), the final decision of the Commissioner shall not be made until this Report has been made available to the parties to the proceeding for at least ten days. An opportunity must be afforded to each party adversely affected by this Report to file exceptions and present argument to the Commissioner. Parties should contact Bernie Melter, Commissioner of Veterans Affairs, 20 West 12th Street, St. Paul, Minnesota 55155, telephone (612) 296-2562, to ascertain the procedure for filing exceptions or presenting argument.

Based upon the written Motions, the documents and affidavits provided with the responses to the Motions, and on all the files and records herein, the Administrative Law Judge makes the following:

ORDER

1. The request of Harold J. Ring for a veterans hearing under Minn. Stat. 197.46 (1992), is appropriately GRANTED. That hearing, however, must take place before a Veterans Preference Panel composed as required by Minn. Stat. 197.46 (1992), or before such alternative agency, if any, as has been provided for by law for hearing substantive veterans cases arising out of employment with the Metropolitan Waste Control Commission.

2. Mr. Ring has not forfeited his right to a veterans hearing by agreement or waiver.

3. In such veterans hearing, the issues to be determined are whether the Petitioner, Harold J. Ring, has been treated reasonably by the Respondent given his physical condition and whether he can be reasonably accommodated in his employment with the Metropolitan Waste Control Commission so that he is competent to continue employment with the Respondent.

4. It is appropriate to deduct from any continued salary and benefits ordered pending the veterans hearing all collateral sources of compensation received by the Petitioner from the date of his discharge until the decision by the hearing panel. Petitioner has not raised a material issue of fact disputing a conclusion that, considering the collateral income sources being received by Mr. Ring, it would not be appropriate to order interim monetary relief.

5. This Order is effective immediately and negates the need for a hearing before the Administrative Law Judge on July 13, 1994.

Dated this 8th day of July, 1994.

BRUCE D. CAMPBELL
Administrative Law Judge

NOTICE

Pursuant to Minn. Stat. 14.62, subd. 1, the agency is required to serve its final decision upon each party and the Administrative Law Judge by first class mail.

Reported: No Hearing Held.

MEMORANDUM

The parties have filed Cross-Motions with the Administrative Law Judge requesting either summary disposition in favor of each party or dismissal of Mr. Ring's claim. Mr. Ring asserts that he is absolutely entitled to a hearing before the Commissioner and that, pending a decision, he is entitled to continue to receive his full salary and benefits from the Respondent. The MWCC argues that Mr. Ring received whatever hearing he was entitled to when the reasonable accommodation panel of the MWCC considered his situation and determined that reasonable accommodation was not possible. The Commission contends that the judicial authority relied upon by Mr. Ring may be distinguished. Finally, it contends that, if the Petitioner is entitled to a further hearing, any monetary relief ordered pending that hearing must be offset by all collateral income sources earned by the Petitioner from the date of his discharge until the date of the decision. For the reasons hereinafter discussed, the Administrative Law Judge has determined that a species of summary disposition is appropriate.

A request for summary disposition is analogous to a motion for summary judgment under Rule 56.02 of the Minnesota Rules of Civil Procedure. The same standards apply. Minn. Rules, pt. 1400.5500 K (1991). Summary disposition of a claim is appropriate when there is no genuine issue as to any material fact and one party is entitled to a favorable decision as a matter of law. Minnesota Rule of Civil Procedure Rule 56.03. A material fact is one which is substantial and will affect the result or outcome of the proceeding depending on the determination of that fact. *Highland Chateau v. Minnesota Department of Public Welfare*, 356 N.W.2d 804 (Minn. App. 1984), rev. den, February 6, 1985. In considering a motion for summary disposition, the evidence must be viewed in the light most favorable to the non-moving party. *Grondahl-v.. Bulluck*, 318 N.W.2d 240 (Minn. 1982); *Nord-v. Herried*, 305 N.W.2d 337 (Minn.

1981); American Druggists Institute v. Thompson Lumber Co. , 349 N.W.2d 569 (Minn. App. 1989).

With a motion for summary disposition, the initial burden is on the moving party to show facts establishing a prima facie case for the absence of material facts at issue. *Theile v. Stick*, 425 N.W.2d 580, 583 (Minn. 1988). Once the moving party has established a prima facie case, the burden shifts to the non-moving party. *Minnesota Mutual Fire & Casualty Company v. Retrum*, 456 N.W.2d 719, 723 (Minn. App. 1990). To resist successfully a motion for summary disposition, the non-moving party must show that there are specific facts in dispute which have a bearing on the outcome of the case. *Hunt v. IBM Mid America Employees Federal*, 384 N.W.2d 853, 855 (Minn. 1986). The non-moving party may not rely on general assertions; significant probative evidence must be offered. Minnesota Rules of Civil Procedure, Rule 56.05; *Carlisle v. City of Minneapolis*, 437 N.W.2d 712, 715 (Minn. App. 1989); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). The evidence introduced to defeat a summary disposition motion need not be admissible trial evidence, however. *Carlisle*, 437 N.W.2d at 715, citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986).

There is no material issue of fact about Mr. Ring's veterans status, or that the MWCC is attempting to discharge the Petitioner because of physical inability to perform his current job. There is also no dispute that the Reasonable Accommodation Panel of the agency, established to implement the Americans with Disabilities Act, determined that reasonable accommodation was not possible. The Administrative Law Judge, for purposes of considering the Cross-Motions, accepts the truth of those facts.

The discharge of a veteran for physical inability to perform a job is equated with a discharge for incompetency under Minn. Stat. 197.46 (1992). *Myers v. City of Oakdale*, 409 N.W.2d 848 (Minn. 1987); *Myers v. City of Oakdale*, 461 N.W.2d 242 (Minn. App. 1990). Since a discharge for physical incapacity is to be equated to a removal for incompetency, Minn. Stat. 197.46 (1992), gives an absolute right to a hearing for the veteran.

It could be argued that Mr. Ring has received the hearing to which he is entitled on the issue of disability by the action of the Reasonable Accommodation Panel of the MWCC which considered whether his disability could be reasonably accommodated at the Respondent's workplace. It is clear that the Americans with Disabilities Act may give Mr. Ring's specific rights. It is equally clear, however, that the availability of an alternative hearing or procedure does not deprive the veteran of his right to pursue a veterans hearing. *Young v. City of Duluth*, 372 N.W.2d 57 (Minn. App. 1985), aff'd as

mod, 386 N.W.2d 732, app. after rem, 410 N.W.2d 27, rev,_den, 415 N.W.2d 20;
AFSCME Council 96 v. Arrowhead Regional Corrections Board, 356 N.W.2d 295 (Minn. 1984); Cass county v. Law_enforcement Labor services_ Inc., 353 N.W.2d 627 (Minn. App. 1984). Thus, the fact that the Reasonable Accommodation Panel of the MWCC made a determination with respect to Mr. Ring's disability and reinstatement has no bearing on his right to a veterans hearing as provided for by Minn. Stat. 197.46 (1992). The scope of the inquiry by the review entity is stated in Myers.y. City of Oakdale, 409 N.W.2d 848 (Minn. 1987). It would be appropriate for the reviewing entity to determine whether the employer acted reasonably. It would also be appropriate, however, for the review entity to determine the issue of reasonable accommodation. If the veteran's job is subject to reasonable accommodation to the physical disability, by definition, the employee is not incompetent to perform the job.

That conclusion by the Administrative Law Judge, however, does not mean that Mr. Ring is entitled to a hearing before the Administrative Law Judge in which the issue of reasonable action by the Employer or reasonable accommodation is considered. Minn. Stat. 197.46 (1992) states the appropriate entity to decide the issue of incompetency. As applicable here, it is either a civil service board or commission or merit system authority or, where no such system has been established, a board of three persons appointed as provided for by statute. Neither the Administrative Law Judge nor the Commissioner of Veterans Affairs can assume the substantive functions of that entity. *Walters v. Ramsey county*, 410 N.W.2d 343 (Minn. App. 1987). For that reason, therefore, it is not appropriate for the Administrative Law Judge to conduct a substantive hearing on the issue of incompetency, reasonable action by the Employer or reasonable accommodation. Minn. Stat. 197.46 (1992), provides that those issues are to be determined by the appropriate reviewing entity.

The Employer argues that Mr. Ring, by not appearing before the Reasonable Accommodation Panel, by agreeing that he was disabled and by agreeing that he could not perform the job as currently structured, has waived his right to a veterans hearing. The Administrative Law Judge disagrees. *State ex rel. Lund v. City of Bemidji*, 209 Minn. 91, 295 N.W. 514 (1941). It is axiomatic that one cannot waive rights except in a knowing, voluntary manner after having been properly notified of such rights. *Young v., city of Duluth supra*. Here, Mr. Ring was only notified of his veterans rights in the dismissal letter dated March 22, 1994. The Reasonable Accommodation Panel met before such notice was given. Hence, Mr. Ring could not have knowingly waived his veterans rights at the time the Reasonable Accommodation Panel met, nor could he have lost any veterans rights by not appearing before it or contesting its findings. Finally, Mr. Ring has never agreed that he has been afforded his full rights by the MWCC or that an accommodation to his physical disability is unreasonable or could not be accomplished. Mr. Ring has not, therefore, waived his rights to a veterans hearing by the entity established under Minn. Stat. 197.46 (1992).

There is significant judicial authority that a veteran who is to be discharged for misconduct may not have his or her salary and benefits interrupted pending a determination by the Civil Service Commission or Veterans Preference Panel. *Mitlyng v. Wolff*, 342 N.W.2d 120 (Minn. 1984); *Leininger v. City of Bloomington*, 299 N.W.2d 723 (Minn. 1990); *Kurtz v. City of Apple Valley*, 290 N.W.2d 171 (Minn. 1980); *State ex rel. Jensen v. Civil Service Commission of the City of Minneapolis*, 130 N.W.2d 143 (Minn. 1964); *Johnson v. Village of Cohasset*, 263 Minn. 425, 116 N.W.2d 692 (Minn. 1962); *Pawelk v. Camden Township*, 415 N.W.2d 47 (Minn. App. 1987); *Henry v. Metropolitan-Waste Control Commission*, 401 N.W.2d 401 (Minn. App. 1987). The purpose of the Veterans Preference Act is to place the veteran in the same position he would have been in if all veterans rights had been afforded.

The Administrative Law Judge does, however, agree with the MWCC that all collateral sources must be deducted from back wages and benefits paid pending a hearing. *Pawelk v. Camden Township*, 415 N.W.2d 47 (Minn. App. 1987); *Young v. City of Duluth*, 410 N.W.2d 27 (Minn. App. 1987), rev. lap, 415 N.W.2d 20 (Minn. 1988). This would include social security disability, workers compensation payments and other payments received to which Mr. Ring would not be entitled if he were not disabled and unable to perform his job. Mr.

Maulwurf's Affidavit, submitted by the MWCC, asserts that, in toto, Mr. Ring is receiving substantially his salary and benefits through assorted disability and assistance payments. Mr. Ring has offered no contrary evidence. Under *Carlisle v. City of Minneapolis*, supra, and *Celotex Corp. v. Catrett*, supra, summary disposition on the question of interim relief is, therefore, appropriate.

BDC